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## CONTRABAND LISTS IN THE PRESENT WAR.

CONTRABAND of war may be defined generally as those goods whose carriage by a neutral to a belligerent may be prohibited by the hostile belligerent because they are of a nature to aid the enemy in the prosecution of the war. Just what commodities are included in this definition has always been a vexed question and never more so than at the present time. Gro-tius, in treating the subject, divided all goods into three classes, viz., those which can only be made use of in war; those which are never made use of in war; and those which are capable of being made use of both in war and peace. The articles falling under the first head are termed absolute contraband and may always be treated as such; those falling under the third head are conditional contraband and, according to the general practice, have been regarded as liable to seizure and condemnation only when destined for the use of the military or naval forces or public authorities of a belligerent.<sup>1</sup>

This classification, although generally accepted in principle during the past three centuries, leaves belligerent powers practically unrestricted in their interpretation and application of the rule laid down. The First Armed Neutrality of 1780 between Russia, Denmark and Sweden, and the Second Armed Neutrality of 1800 between Russia, Sweden, Denmark and Prussia, attempted to limit the kinds of commodities to be regarded as contraband, but failed. The Declaration of Paris of 1856, although containing the term, did not endeavor to define it in any way, which has caused the Declaration to have only a modified application.<sup>2</sup> At the Second Hague Conference of 1907, the question was considered; but no agreement was reached.<sup>3</sup> The Declaration of London, however, went into the matter fully and drew up as a result a list of goods constituting absolute contra-

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<sup>1</sup> The Peterhoff, 5 Wall. 28.

<sup>2</sup> WESTLAKE, WAR, pp. 228-232.

<sup>3</sup> HIGGINS, HAGUE PEACE CONFERENCES, p. 4.

band,<sup>4</sup> one of goods constituting conditional contraband<sup>5</sup> and one of goods which could not be treated as contraband of war in any circumstances.<sup>6</sup>

Under the first head are included: Arms of all kinds, including arms for sporting purposes, and their distinctive component parts; projectiles, charges and cartridges of all kinds and their distinctive component parts; powder and explosives specially prepared for use in war; gun-mountings, limber boxes, limbers, military wagons, field forges and their distinctive component parts; clothing and equipment of a distinctively military character; saddle, draught and pack animals suitable for use in war; articles of camp equipment and their distinctive component parts; armour plates, warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war; implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea. In addition it was provided<sup>7</sup> that articles exclusively used for war might be added to this list by a declaration, notification of which should be addressed to other powers, or, if made after the outbreak of hostilities, to neutral powers.

As conditional contraband were classed: Foodstuffs, forage and grain suitable for feeding animals; clothing, fabrics for clothing and boots and shoes suitable for use in war; gold and silver in coin or bullion and paper money; vehicles of all kinds available for use in war and their component parts; vessels, craft and boats of all kinds, floating docks, parts of docks and their component parts; railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs and telephones; balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines; fuel and lubricants; powder and explosives not specially prepared for use in war; barbed wire and implements for fixing and cutting the same; horseshoes and shoeing materials; harness and saddlery; field glasses, telescopes, chronometers and all

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<sup>4</sup> Art. 22.

<sup>6</sup> Art. 28.

<sup>5</sup> Art. 24.

<sup>7</sup> Art. 23.

kinds of nautical instruments. It was also provided <sup>8</sup> that articles susceptible of use in war as well as peace might be added to this list in the same manner as provided in the case of absolute contraband.

The following articles were placed on the free list: Raw cotton, wool, silk, jute, flax, hemp and other raw materials of the textile industries, and yarns of the same; oil seeds and nuts; copra; rubber, resins, gums and lacs; hops; raw hides, horns, bones and ivory; natural and artificial manures, including nitrates and phosphates for agricultural purposes; metallic ores; earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles; chinaware and glass; paper and paper-making materials; soap, paint and colors, including articles exclusively used in their manufacture, and varnish; bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia and sulphate of copper; agricultural, mining, textile and printing machinery; precious and semi-precious stones, pearls, mother-of-pearl and coral; clocks and watches other than chronometers; fashion and fancy goods; feathers of all kinds, hairs and bristles; articles of household furniture and decoration; office furniture and requisites. And also, by Art. 29, articles serving exclusively to aid the sick and wounded and articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage, were exempted from treatment as contraband.

The contraband lists issued by the German government during the first part of the present war vary but little from the provisions of the Declaration of London. The additions to the absolute list were: powder and explosives not specially prepared for use in war; field glasses, telescopes, chronometers and all kinds of nautical instruments; barbed wire and implements for fixing and cutting the same; coal and coke; aeroplanes, airships, balloons and their distinctive component parts and recognizable accessories—all these being on the list of conditional contraband in the Declaration of London; flax, from the free list; and the following which do not appear in any list in the Declaration: tin-plate, submarine sound signalling appara-

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<sup>8</sup> Art. 25.

tus; lathes of all kinds; and mining lumber. The conditional contraband list is increased by the addition of the following: wool from animals, raw or dressed, together with woolen carded yarns and worsted yarns; rubber and gutta-percha, together with goods made thereof, rubber tires for motor vehicles being specifically designated; certain metallic ores—all of which articles are placed on the free list in the Declaration of London; and also sulphur, sulphuric acid, nitric acid; leather treated and untreated, when suitable for saddlery, harness, military boots, or military clothing; tanning materials of all kinds; including extracts used in tanning; all kinds of lumber, rough or treated, especially hewn, sawed, planed, or fluted—except mining lumber, which is absolute contraband—and tar of charcoal. Certain commodities were also declared incapable of being made contraband of war, which were identical with those so declared in the Declaration of London, except in so far as varied by the contraband lists above.<sup>9</sup>

The Austro-Hungarian government has adopted the list of absolute contraband in the Declaration of London *in toto* and has made only the following additions to the list of conditional contraband: copper in rough, aluminum, nickel, from the free list; and also wood of every kind and wood-tar, sulphur, rough or refined, and sulphuric acid.

The Turkish additions to the contraband lists are all included among those of the German government, except that all machines worked by steam, petroleum, benzine, or electricity, and their component parts; lamps, heliostats, heliograph, and all electrical apparatus; and oil have been made absolute contraband; while books concerning military and naval service, with special reference to books and pictures relative to ordnance, and raw hides have been made conditional contraband.

The French and Russian lists have been changed from time to time to conform to those of Great Britain. Since the last is by far the most extensive and radical of any issued by the belligerent powers and includes all the important variations from

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<sup>9</sup> Ordinance of April 18, 1915. These lists have been greatly enlarged by the ordinance of July, 1916; but the comments on the British lists will apply equally to this. See NEW YORK TIMES, July 26, 1916.

the lists of the Declaration of London which have been made by Germany, Austria-Hungary and Turkey, the action of these latter governments may be dismissed without further discussion; and we may pass at once to a consideration of the policy which England has adopted in the present war.

By Orders in Council issued on August 4, 1914; September 21, 1914 and October 29, 1914, the British government announced lists of contraband which did not differ materially from the provisions of the Declaration of London. By the first of these, aeroplanes, airships, balloons and other aircraft, with their component parts and accessories, were made absolute instead of conditional contraband, a change for which no justification would seem necessary in view of the extensive use to which these are put in present-day warfare. By the Order in Council of September 21st, the following additions were made to the list of conditional contraband: unwrought copper; lead, pig, sheet, or pipe; glycerine and ferrochrome; hematite iron ore; magnetite iron ore; rubber; hides and skins, raw or rough tanned, but not including dressed leather. Of these articles, rubber, raw hides and iron ores were on the free list of the Declaration of London, while the others were not listed. The Order in Council of October 29th put unwrought copper, nickel, iron pyrites, ferrochrome, lead, barbed wire and implements for fixing and cutting the same, motor vehicles and their component parts, rubber and mineral oils on the list of absolute contraband; and added leather, undressed or dressed, suitable for saddlery, harness, or military boots, to the list of conditional contraband.

The classification adopted by the British government up to this stage could give rise to no serious objection on the part of neutral powers. Owing to the failure of the signatories to the Declaration of London to ratify that instrument, its provisions cannot be regarded at most as other than an expression of the general sentiment prevailing at the time as to what articles should be called absolute and what conditional contraband; and, naturally, they have no binding force at the present day. They are open to modification on the part of belligerents; but this right cannot be regarded as an arbitrary one. The principles whereby absolute contraband may include only those articles which by

their very character are destined to be made use of in war, and conditional contraband only those which are not by their very character so destined but which under certain circumstances can be of material assistance to a belligerent in the prosecution of the war, have been so generally set up by countries in the past and so strongly insisted upon by neutral powers—by none more than Great Britain—that they have become part of the existing customary law of nations. As such, the distinction laid down is binding on the belligerents in the present war; and although, as has been pointed out, great scope is given them in their interpretation of those principles as applied to their own case, nevertheless certain limits do exist beyond which they may not properly go.

To the provisions of the first three Orders in Council, however, little objection can be made. It is true that the articles added by the Order in Council of October 29th are all susceptible of use in peace as well as war.

Nevertheless, by their very character, they are capable of being of prime importance in time of war, and although of ancipitous use can be as valuable to a belligerent as articles clearly recognized as absolute contraband. An exception might be made of the inclusion of copper as absolute contraband. In view of the fact that this article enjoys a very extensive use in the industrial arts, more extensive, indeed, than for any warlike purposes, it would seem improper to make it anything more than conditional contraband. Even by former British practice, only copper suitable for sheathing vessels was to be regarded as absolute contraband.<sup>10</sup> The same observation applies to the inclusion of iron ores.<sup>11</sup> Rubber, also, is on the free list of the Declaration of London; but in view of the extensive use to which this commodity is put in modern warfare, especially in connection with motor vehicles, there is little ground for taking exception to its inclusion.

By an Order in Council of December 23, 1914, the British government promulgated a new contraband list that made rather extensive additions to the number of articles to be classed as

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<sup>10</sup> HOLLAND, PRIZE LAW, § 62.

<sup>11</sup> See LAW MAG. AND REV., 1915, p. 81.

absolute contraband, as follows: various ingredients of explosives; resinous products; camphor; turpentine; various chemicals, metals and ores; aluminium; antimony and submarine sound signalling apparatus. Of these, resinous products, camphor and turpentine would hardly seem so necessarily related by their character to the prosecution of the war by a belligerent as to warrant their being made absolute contraband. English practice formerly has included pitch and tar as absolute contraband;<sup>12</sup> while rosin, on the other hand, has always before been held only conditional contraband.<sup>13</sup>

The widening of the bounds formerly placed upon the classification of articles as absolute or conditional contraband has been continued in the Orders in Council subsequent to those already mentioned, viz., in those of March 11, 1915; May 27, 1915; August 20, 1915; October 14, 1915; January 27, 1916; April 12, 1916 and July 7, 1916. The additions that have been made are numerous and in some instances entirely contrary to the international practice that has formerly prevailed. To give a list of all the additions and changes would be a long drawn out business; and it will be sufficient to comment briefly on the more striking features of the various lists.

By the Order in Council of March 11, 1915, raw wool, worsted yarns, castor oil, paraffin wax, lubricants and various sorts of hides and skins were made absolute contraband. It is difficult to see that these articles are sufficiently necessary to the prosecution of a war to be so classed. Raw wool and worsted yarns were on the free list of the Declaration of London, as were also raw hides; their common use is for purely commercial purposes. As such, it would seem more proper to class them as conditional contraband only. Lubricants, according to almost universal previous practice, are regarded as conditional contraband. They are so designated in the Declaration of London and in the contraband lists of all the belligerents prior to this date. By the Order in Council of August 20, 1915, raw cotton, cotton linters, cotton waste and cotton yarns were made absolute contraband.

<sup>12</sup> HOLLAND, PRIZE LAW, § 62; *The Twee Jeffrowen*, 4 C. Rob. 243.

<sup>13</sup> HOLLAND, PRIZE LAW, § 64; *The Nostra Signora de Begona*, 5 C. Rob. 97.



The inclusion of these articles seems manifestly contrary to all previous practice. In 1904, during the Russo-Japanese war, Great Britain herself protested against a similar action on the part of the Russian government; and, as a consequence, Russia declared cotton conditional contraband only.

It has indeed been asserted that in 1861 cotton was declared absolute contraband by the United States government because it took the place of money sent abroad in payment for munitions of war.<sup>14</sup> This assertion, however, is erroneous.<sup>15</sup> Although it was held by the American courts as well as by the military authorities that cotton within the Confederate territory and control was a legitimate subject of capture, such seizure was not on board a neutral vessel, or on neutral territory invaded on the ground of military necessity, but on soil over which the United States had rights of sovereignty. There was no question of maritime law involved; and that the seizures of the United States were not to be narrowed to a question of contraband was specifically stated in a letter of December 3, 1886 from Secretary of State Bayard to Mr. Muruaga, Spanish Ambassador at Washington.<sup>16</sup> In all events, it is submitted that cotton is an article designed so preeminently by its character for peaceful purposes that the subsidiary uses to which it may be put in warfare are overshadowed; and that therefore it should not be regarded as anything more than conditional contraband. Quoting from a letter from Sir Charles Hardinge, British Ambassador at St. Petersburg, to Count Lannsdorf, Russian Minister of Foreign Affairs, of October 9, 1904, "The quantity of raw cotton that might be utilized for explosives would be infinitesimal in comparison with the bulk of the cotton exported \* \* \* for peaceful purposes, and to treat harmless cargoes of this latter description as unconditionally contraband would be to subject a branch of innocent commerce \* \* \* to a most unwarrantable interference."<sup>17</sup>

<sup>14</sup> HALL, *INT. L.*, 5 ed., p. 664; TAYLOR, *INT. PUB. L.*, § 662; 3 WHARTON, *INT. L.*, § 373; YALE LAW J., June, 1916.

<sup>15</sup> 7 MOORE, *DIGEST INT. L.*, § 1234; HOLLAND, *LETTERS TO THE "TIMES" UPON WAR AND NEUTRALITY*, 2 ed., pp. 137-141.

<sup>16</sup> See *FOREIGN RELATIONS*, 1887, 1006, 1108, 1015.

<sup>17</sup> *PARL. PAPERS, RUSSIA*. No. 1 (1905), 24, 25.

Other articles which have been made absolute contraband and which for similar reasons might not seem to have been properly so made are : cork ; bones in any form, whole or crushed, and bone ash ; vegetable fibres and yarns made thereof ; gold, silver, paper money and all negotiable instruments and realizable securities ; starch ; borax, boric acid and other compounds of boron ; and various chemicals extensively used in commercial and industrial pursuits. It must be recognized, however, that there is room for debate in regard to all of the articles mentioned. The difference in conditions surrounding modern warfare would enable the British government to offer a strong defense in case the validity of her classifications should be questioned. The contraband lists which have been examined so far do not pretend to make any change in the basic principles of the law of contraband ; it is the application only which has been varied and the application only which could be contested. Owing to the undefined state in which international law has heretofore left such a question, and the consequent absence of any binding rules as to what may or may not be declared absolute and what conditional contraband, any statement that such and such an article is wrongly classified is open to wide and necessarily indecisive discussion. It must be recognized that a change in conditions may justify a change in interpretation. The British government, however, has gone farther than this. It has practically stated that a change in conditions may justify a change in the principles to be applied ; and that a belligerent, if in its opinion the change in conditions warrants such a change in principles, may at its own discretion arbitrarily make such a change. Such reasoning, if logically carried out, could overthrow any rule of international law, however well established, at the pleasure of a belligerent power.

On April 13, 1916, a White Paper was issued under the authority of the British Foreign Office, headed : "List of Articles Declared to be Contraband of War—Presented to Both Houses of Parliament by Command of His Majesty, April, 1916." It read as follows :

"The articles declared to be contraband of war in the proclamation now in force have been arranged alphabetically in the accompanying list. It is hoped that this will be con-

venient to all parties concerned. The list comprises the articles which have been declared to be absolute contraband as well as those which have been declared to be conditional contraband. The circumstances of the present war are so peculiar that His Majesty's Government considers that for practical purposes the distinction between the two classes of contraband has ceased to have any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy Government has taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for Government use. So long as these exceptional conditions continue our belligerent rights with respect to the two kinds of contraband are the same and our treatment of them must be identical."

It is interesting to compare this language with that contained in the instruction to the British delegation to the Second Hague Peace Conference relating to contraband. Here, a short time after the Russo-Japanese war, during which British commerce had suffered to some extent, the policy of the British Foreign Office was diametrically opposite to that which it is now following. The instructions on the subject of contraband read:

"With regard to contraband, many most difficult questions arose during the late war. These cases were sufficient to show that the rules with regard to contraband that were developed at the end of the eighteenth and the beginning of the nineteenth centuries are no longer satisfactory for the changed conditions under which both commerce and war are now carried on. His Majesty's Government recognize to the full the desirability of freeing neutral commerce to the utmost extent possible from interference by belligerent Powers, and they are ready and willing for their part, in lieu of endeavoring to frame new and more satisfactory rules for the prevention of contraband trade in the future, to abandon the principle of contraband of war altogether, thus allowing the oversea trade in neutral vessels between belligerents on the one hand and neutrals on the other, to continue during war without any restriction, subject only to its exclusion by blockade from an enemy's port. They are convinced that not only the interest of Great

Britain, but the common interest of all nations will be found, on an unbiased examination of the subject, to be served by the adoption of the course suggested.

"In the event of the proposal not being favorably received, an endeavor should be made to frame a list of the articles that are to be regarded as contraband. Your efforts should then be directed to restricting that definition within the narrowest possible limits, and upon lines which have the point of practical extinction as their ultimate aim.

"If a definite list of contraband cannot be secured, you should support and, if necessary, propose regulations intended to insure that nations shall publish during peace the lists of articles they will regard as contraband during war, and that no change shall be made in the list on the outbreak of hostilities.

"A list might be prepared and submitted for adoption by the Conference, specifying the articles which in no event shall fall within the enumeration of contraband, e. g., mails, food stuffs destined for places other than beleaguered fortresses and any raw materials required for the purposes of peaceful industry. It is essential to the interest of Great Britain that every effective measure necessary to protect the importation of food supplies and raw materials for peaceful industries should be accompanied by all the sanctions which the law of nations can supply."

From the policy here outlined to that pursued by Great Britain in the present war seems rather a far cry. Instead of abandoning the principles of contraband, or at least of "restricting that definition within the narrowest possible limits and upon lines which have the point of practical extinction as their ultimate aim," we have seen an unprecedented extension of the term covering articles many of which are for the first time so regarded. Instead of publishing a list during peace to prevail and to remain unchanged during time of war, we have seen a series of proclamations enlarging the list decreed at the outbreak of hostilities. The policy of the British Government throughout has been to increase steadily the number of articles to be classed as absolute contraband; and this, together with the extension of the doctrine of continuous voyage to the carriage of conditional contraband, which was effected by the Order in Council of October 29, 1914, had practically resulted in bringing about indirectly what the

White Paper of April 13, 1916, proclaimed in so many words, viz., the treatment of all contraband as absolute contraband.

The reasons given for the abolition of the distinction between absolute and conditional contraband are two: (a) That so large a proportion of the inhabitants of Germany are taking part in the war that no real distinction can be drawn between the armed forces and the civilian population; (b) that the German government has taken control of the articles classed as conditional contraband so as to render these available for government use. These two arguments are the same as those advanced by the British government in order to justify the seizure of the American steamship *Wilhemina* in the early part of 1915. The vessel was loaded with grain and other foodstuffs consigned to an American citizen at Hamburg. Foodstuffs, being conditional contraband, this cargo ordinarily would not have been subject to seizure, being destined, not for the public authorities, but for the private individual. Moreover, in addition to the assertion of the owner that the cargo was strictly for the consumption of the civil population, the German government volunteered to guarantee that none of it should reach the government, its agents, or contractors, or the military or naval forces, and in order to make this certain, offered to have the cargo distributed under the supervision of American representatives. After the vessel had left America, the grain and flour supply of Germany was placed under government control by the decree of the Bundesrath of January 25, 1915; shortly afterward the decree was amended so as to apply to the domestic food supply only, and not to imported foodstuffs. The *Wilhemina* was nevertheless seized while in Falmouth harbor and placed in the custody of a prize court. To justify this action the British Government put forward the argument that the foodstuffs, although consigned to private individuals, would be distributed under government control; and further said that "the reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces of the enemy government disappears when the distinction between the civil population and the armed forces disappears."<sup>18</sup>

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<sup>18</sup> Note of Sir Edward Grey to the American Government of February 17, 1915.

Of this action on the part of the British Government, Professor Garner has the following to say: "The question raised by the German decree and the construction which the British Government has put on it is a new one, and it is difficult to pronounce a positive opinion on its merits. If the decree applied to imported foodstuffs the contention of the British government would probably be unassailable, but to hold that a municipal regulation designed to conserve and insure an equitable distribution of the domestic food supply is a sufficient ground for treating as contraband, cargoes of imported food consigned to private purchasers is, to say the least, an unprecedented assertion of belligerent rights."<sup>19</sup> It is submitted that these reasons of the British government are not sufficient to justify such a radical step as that taken in this case and by the White Paper of April 13, 1916. Though undoubtedly a large part of the German population is taking part, directly or indirectly, in the prosecution of war, there still remains a considerable civil population engaged in commercial industrial pursuits, or who at least cannot be regarded as engaged in military or governmental operations. To say that the distinction between the civil population and the armed forces of the country has disappeared is hardly in accord with the facts. And to base an action involving such serious interference with neutral trade upon an argument the very truth of which must be open to serious doubt would seem not only an unprecedented but a most unjustifiable assertion of belligerent rights. That the German government has taken control by its decrees of the articles formerly classed as conditional contraband so as to render them available for government use, is a more valid reason for the treatment of such articles as absolute contraband. But it is submitted that the purpose of the government in issuing such decree should be the test as to whether this argument is a sound one. If the German government had assumed the supervision of the distribution of these articles for the express purpose of giving them over to government use, then the action of the British government would be in all probability justifiable. The distinction between absolute and conditional

<sup>19</sup> "International Law in the European War," AM. J. INT. L., 1915, pp. 372, 386.

contraband consisting in that the latter class of articles are contraband only when intended for governmental purposes, if all those commodities formerly regarded as conditional are taken under the control of the government for the express purpose of being applied to governmental uses, then indeed there would be no reason to distinguish further between absolute and conditional contraband. But it seems more probable that in the present case the placing of these articles under the control of the German government has been done, not in order to render them available for the use of the government, but in order to conserve the supply of these articles by an equal and economical distribution. To say that the possibility that these goods might be thus made available for governmental purposes is sufficient to justify their seizure and confiscation as contraband without further proof that they are in fact destined for the use of the military or naval forces or of the public authorities in prosecuting the war seems extremely difficult of justification by any recognized principles of international law.

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